TRUST REGULATION AND THE COURTS[1]

Throughout this paper I shall assume for the sake of argument that a time will presently come when we shall abandon our present attitude toward the trusts, that is, shall cease our efforts to break them up, and, instead, shall approve a policy of legalizing industrial combinations and subjecting them to government regulation. I believe that in our discussion of trusts it is wise for us frequently to adopt this assumption, inasmuch as the tendency of popular thought at the present time is strongly in the direction of giving legal sanction to consolidations, and it is therefore probable that at a date not far distant a change of public policy will actually occur. If that is to be the case it is surely none too early for us to begin seriously to discuss the essential features of an effective system of trust regulation.

It is true that we cannot as yet determine exactly what the scope of trust control should be; but we know that under any circumstances it must be very great. It might conceivably extend to the regulation of prices, quality of output, capitalization, accounts, sales methods, wages, and the conditions of labor, all of which would involve official valuation of properties, public inspection of books and papers, and the submission of financial and operating reports by the companies to the government. But whether trust control embraced all of these subjects or only a portion of them, its influence would be very profound. Moreover, it would cover an exceedingly wide range of business enterprises. It would reach not only all of the combinations now known to be in existence, but a large number of others which are now maintained under the veil of secrecy, and also a throng of new consolidations which would speedily be formed. Thus its influence would be far reaching as well as profound. For these reasons it should certainly from the outset be as wise and as effective a system of regulation as possible. In all prudence and foresight, therefore, it is time to abandon mere

[1] A paper read before the Western Economic Society at Chicago, March 1, 1912.

generalizations respecting it, and to undertake a thorough and detailed consideration of its nature and methods.

In the development of a plan for the control of combinations many questions would arise, but none, perhaps, more important than that involving the determination of the department or departments of government to which the work of regulation should be assigned. To this particular subject, therefore, the present paper invites attention.

The part to be played by the legislative branch of the government is easily determined. Congress would enact the basic law establishing the system of control, sketching out its leading features, and, perhaps, laying down certain broad principles for its administration; but the actual work of regulation would necessarily be placed in other hands, executive or judicial. Such being the case the question of practical importance is this: Should the regulative powers and functions bestowed on administrative officers be exercised by them free from judicial interference, or, on the other hand, should appeals from their acts and decisions be allowed to the courts?

This question, thus broadly stated, must be more specifically defined. There are certain customary types of judicial review which I do not intend to call into controversy. One of these is the examination by the courts of the point as to whether, in issuing a given order, administrative officers have exceeded the authority conferred upon them. Another is the judicial determination of the question whether the order conflicts with a definite provision of the Constitution; for example, whether an order of a federal board is void because it applies to forms of business beyond the constitutional jurisdiction of the federal government. Whether these kinds of judicial intervention should be allowed in connection with trust regulation I do not propose to discuss. I wish, on the contrary, to confine myself to the consideration of one particular species of judicial review, namely, that in which the court essays to judge of the reasonableness of an act, and ends by declaring it void if, in the opinion of a majority of the court, it is unreasonable. It is this vague, undefined, discretionary power of review which is most open to criticism.

That every act of all of the departments of government should be reasonable goes without saying. When a court proclaims this obviously correct proposition no one is inclined to dispute its truth. But nevertheless there is a question of great significance which inevitably arises in this connection. Inasmuch as opinions may and often do differ as to what is reasonable, whose judgment should control? What authority should be vested with final power to decide whether governmental acts are reasonable or not? It is surprising that the American people have given almost no attention to this fundamentally important question, but such is the case. The courts, however, have assumed the responsibility of answering the question and have answered it by asserting that it is their prerogative to determine the reasonableness, not only of their own acts, but of most of the acts of the other two departments of government as well.

But how can the courts sustain the claim that they are entitled to exercise so vast a power? It is one thing to say that the acts of legislative and administrative authorities shall be reasonable. It is quite a different thing to say that they shall be reasonable *in the eyes of the judges*. On what basis can such supremacy of judicial discretion be maintained?

There is not lacking in judicial decisions evidence of a disposition on the part of the courts to attempt to justify their assertion of power on the ground of an extra-constitutional authority to annul any act opposed to the principles of natural right and justice; but the courts have spared themselves the necessity of defending this idea by their interpretation of the due-process-of-law clause which appears in the Fifth and Fourteenth Amendments: "No person shall be deprived of life, liberty or property, without due process of law." At one time those words had a definite, precise meaning; but that is no longer true. As the result of a series of judicial decisions, "to deprive of liberty or property without due process of law" had come to mean "to restrict or invade private rights of liberty or property *unreasonably*." Under this strained construction of the clause, any legislative or administrative act which, in the opinion of the judges, unreasonably infringes liberty or property rights is unconstitutional, and the judges may so declare it. Any

act, therefore, affecting the right of life or of liberty or of property may be appealed to the courts, which may determine whether in their judgment it is reasonable, with power to annul it if their opinion is unfavorable to it. In the end all such questions must, of course, be settled by a majority of the Supreme Court of the United States.

It is to be noted that those who drafted and adopted the due-process-of-law clause in the Fifth and Fourteenth Amendments did not intend or expect it to be interpreted and employed as it has been. That it would be used as a warrant for judicial interference in industrial regulation never entered their minds. Furthermore the Supreme Court did not at first so use it. For example, when the question of government regulation of railway rates first came before the court, in 1876, that tribunal vigorously denied that there was anything in the Constitution—even in the due-process-of-law clause—which would justify a court in considering the question of the reasonableness of the rates. This view the court maintained for fourteen years.[1]

But gradually the doctrine of reasonableness has become established and the judicial discretion has become supreme over that of the legislative and administrative branches of the government. When laws are passed providing for compensation for injured workmen, or limiting the hours of labor in certain employments, or requiring factory owners to maintain certain standards of sanitation and ventilation, or specifying for public utilities their rates or the character of their services, the enforcibility of such laws depends upon the will of the courts. In fact the reasonableness and hence the validity of all legislative and administrative acts for the regu-

[1] With reference to judicial review of the reasonableness of rates prescribed by government authorities for railways and other public utilities, it is a curious fact that most people seem to regard such interference by the courts as an altogether natural proceeding, which is to be taken for granted as if it were customary, and the expediency of which is not to be questioned. Yet in point of fact this special type of judicial review has been practiced for less than twenty-five years. It is an innovation—a recent and unique experiment in government—which the people should have been following with lively interest. But they have paid little heed to it, because, I suppose, of that absurd habit which Americans have, of going on the assumption that while legislators and executive officers may err, everything that a court does—particularly a high court—is right.

lation of industry is a matter for judicial determination, because all such acts affect in some way private rights of liberty or property, or both.

With these considerations before us we are now ready for a more exact statement of our question, which relates specifically to the desirability of applying to trust control this form of judicial intervention. *To the extent that administrative officers are charged with the work of regulating combinations, should the reasonableness of their acts and decisions be subjected to review and final determination by the courts?*[1]

If Congress were to take action in the matter today, it is probable, even certain, that it would answer this question in the affirmative. Two reasons may be given for this opinion. Of late years there has been so much intervention by the courts in industrial regulation that the general public have become accustomed to it, and have come to accept it as a matter of course. But furthermore, as has just been explained, the Constitution as judicially interpreted authorizes the courts and in fact casts upon them the duty of reviewing legislative and executive acts for the regulation of industry. This being the case, it would be necessary to supplement administrative supervision of trusts by judicial review, so long as our Constitution remained unchanged.

But it is my purpose to maintain the proposition that if this is true—as I fear it is—then the Constitution ought to be so amended as to remove the necessity for judicial review, and permit the establishment of exclusively administrative regulation of trusts. To my mind it would be a grave mistake to subject to the mercy of the courts the acts of the executive officers charged with the control of business combinations. To do so would be to insure at the outset the failure of their work. It would mean a weak and ineffective system of regulation which could never succeed in protecting the people against exploitation by the powerful interests who would dominate the highly centralized industries of the nation.

[1] Hereafter in this paper, whenever the expressions "judicial review," "judicial intervention," and the like, are used, they should be understood in the special sense just indicated. That is, they refer to judicial determination of the reasonableness of acts or decisions.

It would plunge the country into grievous difficulties, escape from which would involve a long and strenuous and agonizing struggle. It would postpone to a distant date the realization of industrial democracy, and therefore also the attainment of our American ideal of democracy in government. In short, it would be little less than a national calamity.

That this would be true, it seems to me, has been proved by experience. Anyone who will observe, with impartial mind and without legalistic predilections, the operations of judicial review in this country, must be convinced that it has had and is having a baneful effect upon the efforts of the public to correct the economic evils of the age through government action. For this unfortunate fact numerous reasons may be given. Of these there are two which first demand attention, inasmuch as upon them most of the others in large measure depend.

One of these fundamental reasons is to be found in the fact that the questions involved in industrial regulation are essentially economic rather than legal in character. That this is true seems so evident as hardly to need statement, but since the contrary is often assumed it should be emphatically affirmed. Is the determination of quality of output a legal matter? Obviously not. It is a matter of business. Is it a legal task to work out a system of accounting and oversee its operation? Clearly not. That is work calling for the exercise, not of legal, but of business talents. Yet the same thing may be said of every other possible phase of trust regulation —prices, sales methods, capitalization, wages, labor conditions. Without exception these involve economic, industrial, and financial considerations, but they are in no real sense matters of law, for their determination does not depend upon the application of legal principles or upon the employment of judicial methods and practices. Thus in their intrinsic nature there is nothing to make them proper subjects for judicial treatment; and when, therefore, legislative or administrative authorities undertake to control them, no justification for judicial interference can be found in the character of the subjects regulated.

The second fundamental reason for the pernicious influence of judicial review may be discovered in the related fact that the

questions involved in industrial regulation are legislative and administrative rather than judicial in character. The distinction between questions which are legislative or administrative on the one hand, and those which are judicial on the other, has often been drawn, but never more clearly than by the master mind of Judge Thomas M. Cooley. A judicial question, he points out, is one which can be solved by the application of legal principles and rules, while a legislative question is one which cannot be solved by rules, but is a question of policy, of judgment, of discretion. It is the very function of the courts to settle controversies by the proper application of the rules and principles of law. Their work resembles that of the mathematician, who solves his problems by the skilful use of axioms, rules, and formulas. On the other hand, it is the function of the legislature to determine questions of public policy which cannot be so settled, because they are wholly matters of judgment and discretion. This does not mean that judicial tasks can be performed mechanically, without the exercise of discretion and a discerning judgment. But the significant fact is that the use of those qualities, in judicial as in mathematical questions, is merely incidental to the application of the rules. For legislative questions, however, no rules exist, and they are, therefore, matters of discretion from beginning to end.

With this distinction in mind it is clear that the questions involved in industrial regulation are not judicial in character. No rules can be found adequate for their solution. In most connections no rules can be found at all, and in the few cases in which they have been suggested they have proved wholly insufficient and even misleading.

A few illustrations will serve to enforce this distinction and its bearing upon industrial control. Let us take as an example of a judicial question one such as would arise in an action of assumpsit. One party is suing another for breach of contract, and the question arises whether a contract has actually existed between them. This is undoubtedly a judicial question, which can be settled by the application of a number of legal rules, such as the rules that in a contract an offer and acceptance must be discoverable, that the promise must be supported by a consideration, and that, in various

types of contracts, certain formalities must be observed. By testing the alleged agreement according to these and other requirements, familiar to all lawyers, the court determines the question whether a contract has really been formed.

But on the other hand take the question as to how large the license fee for saloons should be. Should it be $100 or $300 or some other sum? No rule exists to aid in answering this question, which is therefore legislative and not judicial. Take the question of limiting the hours of labor of children between the ages of twelve and sixteen. Shall such hours be ten a day, or eight, or seven, or five, or what? Can the question be settled by rule? Obviously not. Take the question of factory conditions. Exactly what standards of cleanliness, sanitation, ventilation, lighting, and protection from machinery should be maintained? Are there rules which furnish the answer? There are none. Take finally the matter of prices. Can prices be fixed by rule? No. It is true that in railway rate cases the courts have announced a few dicta which bear the outward semblance of rules, but, as Judge Cooley has so clearly shown, these quasi-rules do not settle a question of rates. They simply open up for discussion other questions which are wholly matters of judgment and discretion.

Thus throughout the whole range of industrial regulation, including the field of trust control, we find that the questions involved, pertaining to prices, accounts, quality of product, sales methods, wages, and so on, are all questions of a character which precludes the use of rules as the method of solution, but necessitates the exercise throughout of judgment and discretion. Thus they are legislative and administrative but plainly not judicial. Congress, therefore, should establish the system in its main features and an administrative authority should perform the actual work of regulation, but the acts of neither of them should be subject to judicial review.

But at once I imagine an objection. It may be asked how I can claim that questions of industrial regulation are not judicial, when in fact they are being finally settled in this country by the courts. Is that not proof that they are judicial in character?

No, it is not. For why are they settled in this country by the

courts? Is it because the questions raised are intrinsically legal or judicial? Far from it. It is simply because the Constitution requires it; because, in particular, the due-process-of-law clauses in the Fifth and Fourteenth Amendments, as they have been judicially interpreted, throw upon the courts the duty of review. But we must guard against entertaining the delusive notion that because the Constitution assigns a given function to a certain department of government, the function is therefore necessarily in its nature a part of the proper sphere of that department. Suppose that we were to amend the Constitution so as to confer on Congress the power of trying damage suits in personal-injury cases. Would the character of those admittedly judicial questions be thereby changed and would they henceforth be legislative? Or if we were by constitutional amendment to confer on the courts the right of passing tariff laws, would the legislative questions involved in the enactment of such statutes forthwith become judicial? The point of these illustrations is that even the Constitution cannot work the miracle of changing the essential nature of questions. If, therefore, questions of industrial regulation are in reality non-judicial, the fact that the Constitution assigns their final determination to the courts cannot alter their nature.

In this connection we should remind ourselves that judicial review is a comparatively recent development; that it was for centuries never dreamed of by our English and American ancestors that during that period the notion that there could be anything judicial in questions of industrial regulation never entered the minds of judges, or of anyone else; and that even today almost all civilized nations, except our own, reject that notion and refuse to allow judicial review. Furthermore, our courts now endeavor to justify their intervention, not on the ground that the questions are essentially judicial, but rather on the plea of constitutional requirements.

In the light of these considerations it seems beyond dispute that the American practice of judicial interference with industrial regulation, though authorized by the Constitution as judicially interpreted, is not warranted by the character of the questions involved. Conceding this, however, some might argue that although industrial

questions are not judicial in nature, no harm can result from intrusting them to the courts: that the courts can be relied upon to give them intelligent and adequate treatment. This is an argument which many people would readily accept, because of their traditional confidence in the wisdom and character of our judiciary, in spite of the fact that on general principles no class of questions should be assigned to a body to which they do not naturally belong. It therefore becomes necessary to show that judicial review of industrial regulation is not harmless, but that definite evils inevitably result from it, that specific difficulties attend its exercise, and that these mischiefs are so serious as to justify its unqualified condemnation. Let us therefore notice briefly what some of them are.

1. In the first place, the final settlement of industrial questions is in the hands of judges who know very little about industrial questions, and who have had no special preparation for dealing with them. For, naturally enough, our judges, having devoted themselves to the law, have obtained with rare exceptions no training in the use of economic principles and have made no thorough investigation of industrial conditions. Furthermore, they have no opportunity while on the bench to make an adequate study of these matters. Engaged the greater part of their time in the settlement of strictly judicial questions, they cannot find leisure to acquaint themselves sufficiently with the economic problems which are becoming ever more numerous and complicated. They are therefore hardly qualified to review the acts of administrative officers who can keep in close contact with the subjects of their regulation, and who by undivided attention to such subjects can acquire a thorough familiarity with them and an expert acquaintance with the principles pertaining to them.

2. In the second place, legal technicalities interfere with the proper determination of economic questions. Technicalities, I realize, are to some extent necessary when applying rules to the settlement of controversies. But in treating a question of public policy affecting business they are pernicious. This is especially true with reference to the technical rules of evidence, and to the fact that the outlook of a court is seldom broad enough. A dis-

cretionary question of economic policy, coming before the court, is treated as a "case"—a controversy between parties—whereas in reality it is usually a many-sided question involving numerous interests, social as well as particular. To put in a nut-shell the idea which I have in mind, I should say that a court looks at industrial conditions through the case, whereas it should look at the case through industrial conditions.

3. In the third place, the courts, being accustomed to the settlement of questions by rule, naturally seek for rules with which to solve the economic questions which come before them. But as there are no rules which can serve such a use, a court's search usually ends in total failure, in which case it must decide the question of reasonableness on the basis of whatever ideas of wisdom, justice, or expediency the individual judges may happen to entertain, or on the basis of previous decisions, rendered by other jurists, which have no better foundation. But occasionally the court, failing to discover real rules, may adopt imitation rules. In other words, the court, reaching out after rules and finding none, may clutch at fictions. And it may use these fictions in settling cases. To illustrate: in railway rate cases the federal Supreme Court has adopted the quasi-rule that a change in rates will not affect the volume of traffic. This is an example of what is politely termed a legal fiction, but in point of fact, it is an untrue statement. Everyone knows that with rare exceptions a change in a railway's rates does affect the amount of business, and to assume the contrary as an indisputable fact is to inject at the outset a large element of error into the work of the court. Again, in rate cases the Supreme Court has also adopted a method of procedure which assumes that interstate rates average the same as intrastate rates. This likewise is so far from the truth as to insure the attainment of an incorrect result. Other examples might also be given to illustrate my point that, in their futile search for rules with which to settle industrial questions, the courts sometimes rest content with the veriest types of legal fictions.

4. In the fourth place, the delays inseparable from judicial proceedings have always been an obstacle to efficiency in industrial regulation, and would surely prove a notable impediment to the

control of trusts. Questions pertaining to prices, accounts, sales methods, and so on, demand prompt action, such as administrative officers alone can take. But with judicial proceedings following administrative action, and these supplemented by further proceedings on appeal, final settlement would be so long postponed as to be robbed of much of its value.

5. In the fifth place, were judicial review to be allowed in connection with the regulation of trusts, the Supreme Court would literally be swamped with cases of that class. All questions could ultimately be carried to the Supreme Court, on account of their constitutional character, and they would surely be multitudinous, because trust control would touch many types of business and many aspects of each type, and because, moreover, each case would be in a high degree *sui generis*, and hence could not be regarded as in effect settled by apparently similar cases. For example, a decision holding that a certain price for a given commodity was proper in Wichita, Kan., would not by any means prove that the same price should be charged for the same commodity in New York City. A capitalization of $1,000,000 held correct for corporation A might be wholly wrong in the case of corporation B. Certain qualities of output approved for one concern would not mean that other concerns should not be allowed to turn out a product of a different character. So numerous, so varied, and so peculiar would be the questions arising under trust control, that if appeals were allowed to the courts the Supreme bench would have little time for any of its other and more proper work.

6. In the sixth place, there are certain tendencies of judicial thought which militate against wise and adequate industrial regulation, and which would have that result especially in connection with the control of trusts. Three of these intellectual tendencies demand special mention. The first is a bias against change. This is one of the most pronounced characteristics of the judicial mind. As someone has said, "the courts march slowly down the road of time, their backs to the front and their faces turned toward precedents." Indeed, devotion to precedents is a matter of pride with judges. But in the regulation of our rapidly developing and constantly changing industry such devotion is mischievous in its results.

What is needed is quite the reverse: openness of mind, readiness of judgment, adaptability of ideas and of remedies to conditions found to exist. Judicial steadfastness, so useful in the treatment of legal questions, is out of place in dealing with economic problems.

The second tendency of the judicial mind is to look upon industrial questions in a purely legal way, to be content with seeming solutions which conform to certain legalistic ideas or standards, even when those seeming solutions are wholly delusive and accomplish absolutely no economic results. This mental attitude is entirely natural because judges are trained in the law and not in economics; they are accustomed to seek out the legal phases of every question presenting itself, and to strive for legal rather than industrial achievements. This tendency has been strikingly illustrated by certain recent events, especially those connected with the Standard Oil and Tobacco Trust cases. In those cases the Supreme Court found that unlawful combinations existed, which it ordered dissolved. Accordingly so-called dissolution plans have been devised and put into operation. But these plans, as almost everyone knows, are the merest shams. They make only a pretense, a shallow pretense, at disintegration of the unlawful combinations. Under their terms the oil and tobacco trusts present a different outward appearance, but their essential nature is the same. The combinations still exist, and are just as closely knit as ever. No competition has appeared or will appear.

That the Tobacco plan was not a sincere effort to break up the combination appears plainly in the printed document which was submitted to the federal Circuit Court in New York, and which in its essential features was accepted by the Attorney-General and approved by the court. On pages 48 to 51 of that document is given a statement of the percentages of the stocks of each of the fourteen companies which are to be owned by the twenty-nine individual defendants, and from this statement it is evident that those twenty-nine individuals are to own a controlling interest in the stock of each and all of the fourteen companies—not a majority in any case, but proportions large enough to insure absolute and unquestionable domination. Thus that unity of control which hitherto had been attained through the medium of a holding

company is henceforth to be secured through community of stock ownership. Yet this plan—which promises no industrial results and can yield none—has so satisfied the legal mind that it has received the approval of the Attorney-General and the federal court.

The Standard Oil reorganization is an even clearer case. There the distribution of stock has been on an absolutely *pro rata* basis, with the result that precisely the same gentlemen, who formerly controlled all of the concerns through the ownership of a certain proportion of stock in the New Jersey Company, now control them through their ownership of exactly the same proportion of stock in each of the thirty-four companies. Thus this combination also remains intact. There is not even the cloak of pretense to cover the nakedness of the transaction. Yet the plan has aroused no opposition from the Attorney-General or from the federal court which tried the case. Thus the long struggle over Standard Oil is to produce no real results—no economic results—unless it be one recently suggested in the financial columns, namely, that the oil people now feel that they are justly entitled to raise their prices, because their combination has been deprived of its economical and efficient form of organization!

These and other illustrations, such as the decision of the New York Court of Appeals in the Third Avenue Railway reorganization case, give reality and force to the statement that even when dealing with economic matters, the legal mind is content with purely legal achievements, although such achievements may be devoid of industrial consequences. Great legal victories may be won, but the fruits of victory—the economic fruits—are not claimed. Is it necessary to state what such an attitude of mind means when it controls those who are charged with the regulation of industry?

The third tendency is to be found in the attitude of the courts toward industrial regulation. The tendency of judicial thought is strongly against such regulation. As a rule the courts are hostile to it, and are vigorously disposed to weaken its force and efficiency. This attitude results in part from that conservatism which seems to be a natural product of legal training and judicial experience; but in the main it is due to the peculiar character of the social

philosophy embodied in our jurisprudence. The foundation of our system of law is the philosophy of extreme individualism. Indeed that is not merely its foundation, it is also its heart and soul. The whole body of the law is permeated with the doctrine of private rights.

As is well known, this philosophy of extreme individualism dominated the political and economic thinking of a hundred and a hundred and fifty years ago; but, as is also well known, within the last century human thought has revolted from it and from the economic doctrine of strict *laissez faire* to which it gave rise. The people at large have learned, both from study and from experience, that the industrial evils of the age have resulted from insufficiently restricted private activities, and that, therefore, if those evils are to be corrected, private rights of initiative, of contract, and of property must be limited to a considerable extent by government action.

But, strangely enough, this change in human thought has affected but little those who have shaped the evolution of our law. The philosophical essence of our jurisprudence is still the theory of extreme individualism. The courts still cling to eighteenth-century ideas of the beneficence of untrammeled private rights. Their attitude toward government regulation of industry is therefore inevitably hostile. They tend to look upon such regulation not only as contrary to the economic interests of the country but as subversive of the very purposes for which our government was established. Being empowered, therefore, by the Constitution, as interpreted by themselves, to annul any act of regulation which to their minds is unreasonable, their tendency is to declare void many acts pronounced useful and necessary by the enlightened sense of the age.

Of course this statement is a generalization, and to it, I am happy to say, certain exceptions may be found. From time to time a refreshing utterance comes from a court which shows that some jurist has awakened to the fact that the world has moved and that industry has been revolutionized since Blackstone's day. For example, Chief Justice Winslow of Wisconsin, in the recent workmen's compensation case, spoke as follows: "When an eighteenth-century constitution forms the charter of liberty for a

twentieth-century government, must its general provisions be interpreted by an eighteenth-century mind surrounded by eighteenth-century conditions and ideals? Certainly not. This were to command the race to halt in its progress and to stretch the state upon a veritable bed of Procrustes." Such a statement is cheering evidence that the light of twentieth-century sense is gradually dispelling the archaic gloom of legal speculation. As time goes by, the economic philosophy of the law will almost certainly become more enlightened and progressive, but nevertheless for a very long period the majority of judicial minds will doubtless maintain their traditional opposition to industrial control. This being the case, judicial review will continue to mean that the final determination of the reasonableness of industrial regulations will be vested in bodies that are avowedly hostile to them. Under these circumstances government control of trusts, if subjected to court review, would inevitably be hampered and confused, and in large part frustrated.

In the light of all the reasons which have been given, it seems clear to my mind why judicial review has been so disturbing and disastrous an influence. Why, let me ask, why have our efforts to regulate industry proved so futile? Why have we been able to eliminate or mitigate so few of the industrial evils of the age? Why have so many of our economic disorders become chronic and their symptoms increasingly alarming? Why do complaints of economic injustice and oppression become ever louder and more frequent? Why do the waves of social unrest mount ever higher and why is their roaring increasingly ominous in our ears? There are numerous reasons, but one of the most important is judicial review. To permit trust regulation, therefore, to be encumbered with judicial supervision would be a colossal blunder. Yet we cannot appreciate that fact unless we face the situation squarely and contemplate it with impartial mind—without the bias occasioned by intellectual submission to legalistic fictions and technicalities, and without the prejudices engendered by acceptance of those antiquated economic and philosophical dogmas which are embodied in the law.

After all, when you clear away the dust and cobwebs of legal fictions and precedents and technicalities, is not the very idea of

judicial review of economic questions an utter absurdity? Why should such questions be taken out of the hands of industrial experts and assigned to legally trained men for settlement? Would we for a moment tolerate a similar procedure in relation to any other class of subjects? Upon whom do we rely for the determination of an engineering question? Do we let expert engineers deal with it in the first instance, but when they are done transfer it to a tribunal of dentists for final settlement? When expert accountants pass upon a question of accounting would we think it wise policy to vest in a tribunal of physicians the power to review their conclusion? Such comparisons are ridiculous, no doubt, but to my mind they are hardly more ridiculous than is judicial review of non-judicial questions. What would be the feelings of lawyers if after a strictly legal question had been judicially settled an appeal could be taken from the decision of the court to a body of laymen —a body of laymen who had at most only general notions of law? How would they feel? Were they to answer that question candidly, they would understand how some others feel when they see industrial questions taken out of the hands of expert administrative bodies and appealed for final settlement to a class of tribunals which have only general notions of economics, but no thorough acquaintance with that science or expert knowledge of industrial affairs.

I could rest my argument here with some confidence, but there are two other points of view from which the subject may be observed, and I feel that a moment's attention should be given to each. So far my effort has been to show that judicial review would necessarily be disastrous in its effect upon trust regulation; but, changing the object of our interest, we should also observe that it would likewise be injurious to the courts themselves. For the effect of judicial review is to weaken popular respect for the courts, and hence also for the law.

This is due chiefly to the fact that so long as judges confine themselves to the adjudication of judicial questions through the application of legal principles and rules about which the great body of the people know little or nothing, there is comparatively little possibility of popular criticism of the courts, and the maintenance of respect for them is relatively easy. But when judges depart

from their proper sphere and assume to settle questions about which every intelligent man knows fully as much as they, the courts become exposed to general criticism. Indeed, when judges descend from their lofty isolation and join in the industrial conflicts of the day, there is a tendency at once for the people to lose regard for them and confidence in them. This is especially true when the courts take sides in those conflicts as they necessarily must, in view of the traditions and ideals of the law. But for their own sake and for the preservation of that respect for the judiciary and for the law upon which the stability of our institutions in so large measure depends, the courts should be protected against all avoidable criticism.

If anyone has gained the impression that I am an enemy of the courts, that I have a feeling against them so profound that I would take an unholy delight in seeing ill come to them, I trust that the observations I have just made will correct that impression. No one has a more sincere feeling of good-will toward the judiciary than I have. No one more thoroughly appreciates the importance of preserving respect for the courts than do I. But I realize clearly that you cannot maintain respect for the courts simply by urging the people to respect them, or by asserting that it is their duty to respect them. In the long run they will cease to respect the courts —or any other institution—which has, in their judgment, ceased to deserve their respect. I also realize that so long as judges mix in the industrial fray that daily becomes more intense and more bitter, they cannot retain popular respect or approval. So in the interests of the courts themselves, as well as for the sake of effective handling of our economic problems, I urge that judicial review of trust regulation would be a grave mistake.

The second point of view is a broad one, and pertains to our national destiny. What is the ultimate end and object of our country's existence? What great contribution is the United States to make to the political experience and apprehension of mankind? None, to my mind, more important than this: that it may demonstrate that popular government can be a success. Have we not set this goal before us? Have we not dedicated ourselves to the task of proving that a "government of the people, by the people, and

for the people" need not perish from the earth, but can be permanently maintained? Yet consider that judicial review involves taking all questions of public policy respecting industry away from the people's accountable representatives, and placing their final settlement in the hands of the federal Supreme Court, which is an autocratic tribunal composed of judges having life tenure of office, who are in no real sense responsible or accountable to the people. Is not such a procedure a frank confession that neither the people nor their accountable representatives are fit to govern? Is it not an abandonment of our national ideal? Does it not mean giving up our effort to achieve the goal of our nation's destiny? As a firm believer in popular government, I find it difficult to contemplate judicial review without the gravest apprehension.

So from every point of view it seems to me clear that when trust regulation comes it should be purely legislative and administrative in character. This does not mean, of course, that when questions arise incidentally which are plainly judicial, the courts should be denied the prerogative of determining them. Thus, such criminal prosecutions as might prove necessary in the work of regulation would be brought in the courts, and suits for damages would probably also be maintained in judicial tribunals. But there should be no judicial review of the reasonableness of administrative acts.

Of course it will be objected that an administrative body may do unfair or unjust things, and that unless appeals from its orders are allowed, those who are most affected may be caused unmerited suffering. Very well, let that be conceded. In no way, however, is it an argument for *judicial* review. Lawyers as well as laymen have similar distrust of the lower courts, and to guard against improper exercise of judicial power by such courts provision is made for appeals. But to whom are the appeals taken? Are questions of law appealed from trial courts to tribunals of business men or economists? Of course not. They are appealed to higher courts—to higher tribunals of the same type as those in which the initial decisions were rendered. Why should not the same principle be applied to administrative authorities? If appeals from courts lie to higher courts, why should not appeals from administrative bodies be taken to higher administrative bodies? It seems to me that that is the only sane and rational procedure. It seems to

me that the Constitution should be so amended as to make that procedure possible. We ought to have, I believe, as the final authority, one high administrative board of such superior character and competence that we should feel confidence in resting the final disposition of administrative questions in its hands, and should have for its decisions on economic matters the same respect that we now entertain for the decisions of the federal Supreme Court on legal matters.

In the preparation of this plea for administrative control of combinations, I have been cheered by the reflection that others seem to have come to the same conclusion—others whose views are entitled to great respect. For example, in his famous editorial advocating the legalization and control of industrial combinations, Theodore Roosevelt asserted that "this control should be exercised, not by the courts, but by an administrative bureau or board . . . . for the courts cannot with advantage permanently perform executive and administrative functions." In a subsequent editorial he quoted from a letter received by him from a gentleman whom he described as a "distinguished United States judge," who wrote as follows: "The courts ought as far as possible to be relieved from the task of regulating the trusts. It is not their business. They suffer in the process. It is of first importance that the courts shall be universally respected. So long as their work is confined to doing justice between man and man it is not difficult for them to retain the general respect of the community and to deserve it. Whenever they are called on to do other things they are likely to lose it, and to some extent deserve to lose it. They fail when they are called on to pass upon questions of governmental policy. . . . . They fail because they are merely ordinary men, and they are put at work for which their judicial training probably makes them, if anything, a little less fit than the ordinary man."

With these quotations I rest my case. Regulation of industrial combinations should be administrative, without judicial review, for the sake, primarily, of wise and effective control, but also in order to preserve respect for our courts, to maintain the political capacity of our people, and to insure continued devotion to our national ideals.

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